

1. 1507754 (Migration) [2016] AATA 3405 (29 February 2016)
- 2.
- 3.
- 4.

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Mr Gurpreet Singh Bal Mrs Harjit Kaur Master Arunvir Singh Bal
CASE NUMBER:	1507754
DIBP REFERENCE(S):	BCC2012/4584
MEMBER:	John Billings
DATE:	29 February 2016
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicants Skilled (Provisional) (Class VC) visas.

Statement made on 29 February 2016 at 09:25 am

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

5. This is an application for review of a decision made by a delegate of the Minister for Immigration on 27 May 2015 to refuse to grant the applicants Skilled (Provisional) (Class VC) visas under s.65 of the *Migration Act 1958* (the Act).
6. The first named applicant, Mr Gurpreet Singh Bal, applied for the visas on 21 December 2011. The second named applicant, Ms Kaur, was included in the visa application. Their son, Master Arunvir Singh Bal ("Mr Bal's son"), was born in India in October 2014 and subsequently included as a further secondary applicant. The delegate refused to grant the visas on the basis that Mr Bal did not satisfy the requirements of cl.487.228 of Schedule 2 to the Migration Regulations 1994 (the Regulations). In circumstances described below the delegate considered that Mr Bal did not satisfy PIC (Public Interest Criterion) 4020. Mr Bal applied for review on 5 June 2015.
7. The applicants were represented in relation to the review by their registered migration agent.
8. There was no hearing. On 25 January 2016 the Tribunal sent to Ms Thach an invitation to appear before the Tribunal at 11.00 am on 26 February 2016. The invitation was sent by email to Mr Bal's representative and authorised recipient. The Tribunal received a response to the hearing invitation indicating that Mr Bal and his wife and child and the representative would attend. The Tribunal's case management system records that on 19 and 25 February 2016 the Tribunal sent SMS hearing reminders to the mobile phone number provided by Mr Bal. The applicants did not attend on 26 February. The Tribunal has received no explanation for that. In the circumstances, pursuant to s.362B of the Act, the Tribunal has decided to make its decision on the review without taking further action to enable the applicants to appear before it.
9. Mr Bal is a 30 year old national of India. He first arrived in Australia on 16 March 2006 holding an Indian passport and a Class TU Student visa. He has been granted further visas since that time including a Class VC 485 visa. Ms Kaur is a 31 year old national of India. She first arrived in Australia on 13 June 2010 as a visitor. Mr Bal and Ms Kaur were married not long before then, in February 2010.
10. The Department's file includes a copy of the three applicants' Indian passports.
11. Mr Bal provided a copy of the primary decision with the application for review. The primary decision includes the following information. Mr Bal made a previous application for a Subclass 487 visa in August 2010. The decision records that he submitted with the application an IELTS test report form indicating that on 1 December 2011 he achieved the following scores: Listening 9.0; Reading 6.5; Writing 6.0; and Speaking 7.0. (The delegate presumable meant something like "in connection with" rather than "with" for the IELTS test report form obviously post-dated the visa application date). The decision proceeds to say that the Department conducted checks to confirm the information provided in the application. (In this instance the Tribunal infers that the delegate was referring to the application for the visas currently under review – that is the application made on 21 December 2011). In any event, the decision records that the Department was unable to verify the IELTS test report form through the IELTS test report form verification service. The Department instead found that the results listed showed a score of zero for each of the four test components. Further, the Department received information that indicates that the test was taken by another person and that the test result of 1 December 2011 had therefore been cancelled.

12. The test report form number referred to in the primary decision as the one provided by Mr Bal in connection with the previous Subclass 487 visa application is the same as the number of the report form that the primary decision indicates the Department sought to verify.
13. In the application made on 21 December 2011, at item 29, when prompted to provide evidence of his English language ability for instance by providing an IELTS test report form number Mr Bal provided the same test report number as the one mentioned in the primary decision.
14. The Department's file indicates that there was initially indecision about how best to proceed which may be part of the explanation for Mr Bal being given more than one opportunity to respond to the adverse information concerning his results. The primary decision nevertheless records that he was given that opportunity and that he responded in writing. In his response Mr Bal essentially stated that he did not provide any "false or misleading document" to the Department in connection with the application made on 21 December 2011 – that he did not submit any "IELTS test result". He pointed out that the previous application for the Subclass 487 visa was finalised without being determined. He said that he had never been informed that his results were cancelled. He maintained that he sat the test in India on 1 December 2011 and achieved the minimum score of six in each of the four test components. The results were displayed on the IELTS website. IELTS security would not permit another person to sit in a candidate's place. He said that the Department's position was based on "mere conjectures". He added that he otherwise had competent English, demonstrated by his study and employment in Australia. He also said that if the visas were refused his return to India would affect his and his family's life and wellbeing.
15. In a written submission to the Tribunal dated 24 February 2016 Mr Bal noted that the visas were refused on the grounds that he did not satisfy PIC 4020 but he did not really address that. He stated that PIC 4020 should be waived. In summary the grounds were that he has been in Australia for years and as an international student and later as a member of the workforce he has contributed to Australian society and the economy. He submitted a letter from his employer and said that the employer needed him to run the business. Mr Bal said there are compelling circumstances affecting the interests of Australia: if the visas are refused on the basis that PIC is not met, his and his family's return to India would be contrary to their wellbeing and would affect their lives for a long time as well as the lives of their families. Mr Bal said that the IELTS results "claimed to be [a] bogus document" predated the birth of his child by a long time and so PIC 4020 could not be "imposed" on the child. The child, and the child's mother, Ms Kaur, had never submitted any bogus document, he said. The employer's letter was by Mr Andrew Yamouni and dated 23 February 2016 on behalf of a taxi company where Mr Bal has worked as a workshop manager. Mr Yamouni said among other things that Mr Bal is professional and hardworking. He said that without Mr Bal's contribution he "may not be able to operate a successful business as [he does] now".
16. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

17. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.487.228 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or

misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: cl.4020(1); and

- the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy cl.4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2) and (2AA); and
- the applicant satisfies the Minister as to his or her identity: cl.4020(2A); and
- neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2B) and (2BA).

18. The requirements in cl.4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: cl.4020(4). However, this waiver does not apply to the identity requirements in cl.4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

HAS THE APPLICANT GIVEN, OR CAUSED TO BE GIVEN A BOGUS DOCUMENT, OR INFORMATION THAT IS FALSE OR MISLEADING IN MATERIAL PARTICULAR?

19. The term 'information that is false or misleading in a material particular' is defined in cl.4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in cl.4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Batra v MIAC* [2013] FCA 274.
20. The requirement in cl.4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: cl.4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
21. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
22. The primary decision, read with Mr Bal's response to adverse information, indicates that he provided the relevant test report form to the Department in connection with the previous application for Subclass 487 visas. The evidence however does not enable the Tribunal to find that he gave or caused to be given to the Department that document in relation to the application for a visas made on 21 December 2011. The case is to that extent different one to *Patel v MIBP* [2014] FCCA 2059 which concerned a bogus document, being an IELTS test report form. However, the visa application made on 21 December 2011 contained information at item 29 that his evidence about his English language ability comprised the test results in the test report form whose number he quoted. In the Tribunal's

view there is evidence that Mr Bal therefore gave or caused to be given to the Minister information that was false or misleading in a material particular in relation to the visa application made on 21 December 2011 – that is false or misleading and relevant to the requirement for him to have English language ability of a certain standard.

23. Therefore, Mr Bal does not meet cl.4020(1).

SHOULD THE REQUIREMENTS OF CL.4020(1) OR (2) BE WAIVED?

24. The requirements of cl.4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa.
25. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.
26. The Tribunal has had regard to the relevant Explanatory Statement (Explanatory Statement to F2011L00336). The Tribunal has also had regard to statements in the current version of PAM3.
27. The Tribunal does not see in this case that Australia's trade or business opportunities would be adversely affected or that Australia would miss out on a significant economic or other benefit of the kind mentioned in policy, or other compelling circumstances affecting the interests of Australia. The Tribunal does not see in this case health, welfare or family factors of the kind mentioned by way of example in the Explanatory Statement or policy or any other factors that give rise to compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen.
28. Mr Yamouni says on behalf of Mr Bal's employer only that without Mr Bal's contribution he "may" not be able to operate a successful business as he does now. If he meant to say that he "would" not be able to operate a successful business, there is no evidence for that but only Mr Yamouni's comments about Mr Bal's value as an employee. What Mr Yamouni has said does not satisfy the Tribunal that another person could not be recruited and developed within the business to the required standard. Practical barriers of one kind or another and the costs ordinarily involved in recruiting and training staff are well known features of businesses generally.
29. In the Tribunal's view, hardworking and valuable as Mr Bal may be in his position as workshop manager in his employer's business, these and the other considerations put forward concerning him and his family do not establish compelling circumstances that affect the interests of Australia or compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or eligible New Zealand citizen that justify the of the visa: see *Vyas v MIMAC* [2013] FCCA 1226.
30. In summary, there is insufficient evidence before the Tribunal that would enable it to find that there are compelling circumstances that affect the interests of Australia, or that there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen.
31. Therefore the requirements of cl.4020(1) should not be waived.
32. On the basis of the above, Mr Bal does not satisfy PIC 4020 for the purposes of cl.487.228.

33. The Tribunal further finds that Mr Bal does not meet cl.487.215. The evidence does not satisfy the Tribunal that he has competent English as that
34. Ms Kaur and Mr Bal's child are not members of the family unit of a person who satisfies the primary criteria or who holds a relevant visa and so they do not meet the requirements of cl.487.311 and cl.487.321.
35. The only other visa subclass to consider would be Subclass 485 but for that subclass there are essentially the same criteria regarding PIC 4020 and similar secondary criteria.

DECISION

36. The Tribunal affirms the decision not to grant the applicants Skilled (Provisional) (Class VC) visas.

John Billings
Senior Member

ATTACHMENT

MIGRATION REGULATIONS 1994

SCHEDULE 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; the applicant and each member of a family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

MIGRATION ACT 1958

S.5 INTERPRETATION

- (1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...